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2017CIT-2-1013

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Attorneys for Plaintiff

**SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE**

KELLY S. PARKER,)
Plaintiff,)
)
v.) Case No. 3AN-19-_____ CI
MICHAEL DUNLEAVY,)
TUCKERMAN BABCOCK,)
and STATE OF ALASKA,)
Defendants.)
)

**COMPLAINT FOR DAMAGES AND DECLARATORY AND INJUNCTIVE
RELIEF**

INTRODUCTION

1. Kelly Parker was employed as an Assistant Public Advocate from August 16, 2016, through December 3, 2018. Her job responsibilities consisted entirely of

representing indigent persons with interests legally adverse to the State of Alaska – individuals charged with crimes, juveniles charged in delinquency matters, and parents and children in Child in Need of Aid cases.

2. Shortly after Michael Dunleavy was elected to serve as Governor of the State of Alaska, but before he was sworn into that office, he and the chair of his Transition Team, Tuckerman Babcock, stated publicly that the incoming Governor wanted all at-will employees who wished to continue in their jobs to express affirmatively that they wished to work in the Dunleavy administration on the Governor's agenda; he was therefore requesting resignation letters from at-will employees. The Transition Team sent emails to Ms. Parker and many other at-will employees, advising that they were required to submit a letter of resignation and a request for re-employment if they wished to continue in their jobs.

3. Ms. Parker wrote a letter stating that she wished to continue in her position, but she could not ethically pledge loyalty to the Governor, who, as the head of the State, brings the cases against her clients. By definition, all her clients' interests were legally adverse to the interests of the State. Ms. Parker was thereupon fired, effective at precisely the time the Governor was due to be inaugurated.

4. Kelly Parker brings this action to vindicate her right as a state employee – and the rights of similarly situated non-policymaking state employees – to freedom of speech and association under the Alaska Constitution and the right to be treated in accordance with the covenant of good faith and fair dealing. Her wrongful termination

also implicates the rights of her former clients and future clients of the Office of Public Advocacy (“OPA”) to effective, conflict-free representation, as guaranteed under state law and the state constitution. Court-appointed counsel are subject to an inherent conflict of interest if they are subject to firing without cause by State officials who are responsible for bringing the cases against the attorney’s clients or subject to firing simply because they will not agree to support the State’s “agenda.”

JURISDICTION AND VENUE

5. This is a complaint for damages and declaratory and injunctive relief. This court has jurisdiction over the parties and the subject matter of this dispute under AS 09.05.015(a)(1), 09.40.230, and 22.10.020(a) and (g).

6. Venue is proper in this district under AS 22.10.030 and Alaska Civil Procedure Rule 3(c).

PARTIES

7. Plaintiff Kelly Parker is a resident of Fairbanks, Alaska.

8. Defendant Michael Dunleavy is a resident of the State of Alaska and is currently the Governor of the State. He is responsible, in whole or part, for the decision to terminate Ms. Parker’s employment. Mr. Dunleavy is sued in his official capacity.

9. Defendant Tuckerman Babcock is a resident of the State of Alaska. He was chair of Governor-Elect Dunleavy’s Transition Team and then Chief of Staff to Governor Dunleavy. Mr. Babcock is responsible, in whole or part, for the decision to terminate Ms. Parker’s employment. Mr. Babcock is sued in his official capacity.

10. Defendant State of Alaska is a sovereign entity and, through its agents, is responsible for the decision to terminate Ms. Parker's employment.

STATEMENT OF FACTS

Kelly Parker's employment at OPA

11. Ms. Parker was hired by the Office of Public Advocacy on August 16, 2016, and served as an Assistant Public Advocate until December 3, 2018.

12. As an Assistant Public Advocate, Ms. Parker's case load consisted primarily of criminal defense work, representing individuals whom the State had charged with misdemeanor and felony offenses. Additionally, she represented juveniles in delinquency matters, and parents and children in Child in Need of Aid cases, where the State alleged that the parents should no longer have full custody and control over their children's upbringing. In all of her cases, the court appointed OPA to represent her clients.

13. The State of Alaska was the adverse party to Ms. Parker's client in all of her cases.

14. During Ms. Parker's employment by OPA, she was highly regarded by her supervisor, coworkers, legal adversaries, and other professionals in the community for the quality of her work on behalf of her clients. After her first year of employment by OPA, in October 2017, she was promoted from an Attorney II to an Attorney III. Her supervisor praised her work and described her as "extremely meticulous" and "a very hard worker," with "excellent work habits" and an "impeccable" quality of work. The

supervisor recommended the promotion, stating: "Kelly is an asset to this office. She is hard-working and detail-oriented. She has a strong compassion for her clients that comes across in her interactions with them and in her courtroom advocacy."

15. Throughout Ms. Parker's remaining employment with OPA, she continued her hard work and maintained the support of her supervisor as she increased her skills and successfully managed an increasing caseload and more serious criminal cases.

The gubernatorial election and actions of the Transition Team

16. Michael Dunleavy was elected Governor of Alaska in the general election held on November 6, 2018. He was sworn in as Alaska's Governor at noon on December 3, 2018.

17. Shortly after his election, Mr. Dunleavy selected Tuckerman Babcock to be the chair of his Transition Team and the Governor's Chief of Staff following the inauguration.

18. In mid-November 2018, Mr. Babcock, acting as chair of the Transition Team, sent a memorandum to most at-will state employees (i.e., those who were classified as "exempt" or "partially exempt" under AS 39.25.110 and .120), requiring them to submit their resignations in writing no later than November 30, 2018. This memorandum (hereinafter the "Babcock Memorandum") is attached as Exhibit 1 to this Complaint.

19. Although the Babcock Memorandum characterized the widespread request for resignations as "customary during the transition from one administration to the next,"

this was not accurate; the Babcock Memorandum was sent to an unprecedented number of state employees, approximately 800 to 1200. The incoming Walker administration, by contrast, requested resignation letters from approximately 250 state employees.

20. Upon information and belief, attorneys employed by OPA had not previously been directed to submit resignation letters as part of a gubernatorial transition.

21. A spokesperson for Governor-elect Dunleavy acknowledged that his Transition Team had “broadened the scope of which employees have been asked to take this step [of submitting resignation letters].” A newspaper article containing this comment is attached as Exhibit 2 to this Complaint.

22. Governor-elect Dunleavy publicly stated on November 16, 2018, that he broadened the list of people required to resign because he “want[ed] to give people an opportunity to think about whether they want to remain with [my] administration and be able to have a conversation with us.” [Exhibit 2]

23. Tuckerman Babcock further explained in a public statement on November 16, 2018, that Governor-elect Dunleavy “just wants all of the state employees who are at-will – partially exempt, exempt employees – to affirmatively say, ‘Yes, I want to work for the Dunleavy administration. . . . Not just bureaucracy staying in place, but sending out the message, ‘Do you want to work on this agenda, do you want to work in this administration? Just let us know.’” [Exhibit 2]

24. Mr. Babcock stated expressly in his November 16 public statement that anyone who received the Memorandum and did not submit a resignation letter would be

terminated from his or her position: "If you don't want to express a positive desire, just don't submit your letter of resignation. . . . And then you've let us know you just wish to be terminated." [Exhibit 2]

Kelly Parker's termination

25. Kelly Parker was one of the employees who received the Babcock Memorandum. It was sent to her via her work email address.

26. On November 29, 2018, Ms. Parker received a follow-up email from the Transition Team, noting that the Transition Team had not yet received a response to the request for her resignation and reminding her of the November 30 deadline for submitting her letter of resignation and any statement of interest in re-employment.

27. On November 30, 2018, Ms. Parker emailed the Transition Team a letter that responded to the request for her resignation. She stated that she did not wish to be terminated and that she desired to continue her work as an Assistant Public Advocate. Ms. Parker explained, however, that she believed she could not ethically submit a resignation letter and request re-employment under circumstances in which the request for re-employment would be considered an affirmative expression of a desire to work for the Governor, on his agenda. In pertinent part, Ms. Parker's letter stated:

As an Assistant Public Advocate with the Office of Public Advocacy, I am appointed to represent indigent criminal defendants, juveniles in delinquency matters, and parents and children in child in need of aid cases. As an attorney and a member of the Alaska Bar Association, I am bound by the Professional Rules of Conduct. I have a duty of loyalty to all of my clients, and it is my responsibility to remain undivided in that loyalty and to avoid personal conflicts of interest.

Mr. Babcock's request for my resignation and statement of interest in retaining my position – paired together with statements to the media that any such resignation and statement from a State employee in response to Mr. Babcock's request will be taken to mean that the employee is affirmatively stating that the employee wants to work for your administration and on your agenda, and that those who do not submit such a resignation and statement will be terminated – appears to require a pledge of loyalty from me in order to retain my position.

Because of my role as a defensive advocate and my professional responsibilities as a member of the Alaska Bar Association, I cannot comply with Mr. Babcock's request. The State of Alaska, in all cases, is legally adverse to my clients. It would therefore be extremely problematic for me to pledge personal loyalty to the head of the State in order to retain my role as an Assistant Public Advocate. Were I to do so, I would create a substantial ongoing personal conflict of interest, placing my personal interests (my job, income, family, home, etc.) above my clients' interests, damaging the client-attorney relationship, and interfering with my ability to zealously represent my clients.

To be clear, I do not wish to be terminated. I work hard for my clients, and I desire to continue to serve my clients in my current position. I love Alaska, and I believe that you do too. I hope that we can each move forward in our positions and preserve the sanctity of our adversarial justice system.

Ms. Parker's letter is attached as Exhibit 3 to this Complaint.

28. On December 3, 2018, at 11:27 a.m., Ms. Parker received an email from the Transition Team, advising her that her employment was terminated as of noon that day. The email is signed "Tuckerman Babcock, Governor-Elect Dunleavy Transition Chair." A copy of the email is attached as Exhibit 4 to this Complaint.

29. As a result of being fired with approximately one-half hour notice, Ms. Parker was unable to represent her clients as planned, and did not even have time to prepare for a transfer of representation to another attorney.

30. Upon information and belief, neither Ms. Parker's supervisor nor anyone within OPA was involved in her firing or aware in advance that she would be fired.

FIRST CAUSE OF ACTION
VIOLATION OF THE RIGHT OF FREEDOM OF SPEECH AND ASSOCIATION
ALASKA CONSTITUTION ARTICLE I § 5

31. Article I § 5 of the Alaska Constitution provides: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."

32. Article I § 5 of the Alaska Constitution guarantees that public employees in non-policymaking positions cannot constitutionally be compelled to surrender their free speech rights.

33. Article I § 5 of the Alaska Constitution prohibits the State government from requiring public employees in non-policymaking positions to express allegiance to any particular political position, agenda, platform, or person.

34. Article I § 5 of the Alaska Constitution prohibits the State government from requiring public employees in non-policymaking positions to associate with any particular political position, agenda, platform, or person.

35. The Alaska Constitution provides at least as much protection to free speech and association rights as the United States Constitution.

36. The United States Supreme Court has recognized expressly that conditioning a public defender's continued employment upon his or her support for the current political administration violates the employee's First Amendment rights:

[I]t is manifest that the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political

party in control of the county government. The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State. . . . “[H]is duty is not to the public at large . . . His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is to act independently of the government and to oppose it in adversary litigation.” Whatever policymaking occurs in the public defender’s office must relate to the needs of individual clients and not to any partisan political interests. . . . [I]t would undermine, rather than promote, the effective performance of an assistant public defender’s office to make his tenure dependent on his allegiance to the dominant political party.

Branti v. Finkel, 445 U.S. 507, 519 (1980), quoting *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).

37. As an Assistant Public Advocate, Kelly Parker was employed in a non-policymaking position.

38. Kelly Parker exercised her right to speak freely, as protected by the Alaska Constitution, when she wrote her November 30 letter explaining why, although she desired to retain her position, she concluded she was ethically compelled to decline to submit a letter of resignation and request for re-employment, in circumstances where the spokespersons for the incoming administration, including Mr. Dunleavy and Mr. Babcock, characterized the requirement to resign and any request for re-employment as a political statement affirmatively expressing support for Governor Dunleavy’s political agenda.

39. Kelly Parker exercised her right to refrain from speaking, as protected by the Alaska Constitution, when she declined to prepare a letter of resignation and request for re-employment under circumstances where the request for re-employment was

defined by defendants as expressing a desire to work in support of the Governor and his political agenda.

40. Kelly Parker exercised her right of freedom of association when she declined to submit a letter requesting re-employment in circumstances where such letter was defined as a request to associate herself with Governor Dunleavy and his political agenda.

41. Defendants terminated Ms. Parker's state employment because she exercised her rights to speak, to refrain from speaking, and to associate or not associate, all as protected by the Alaska Constitution.

42. Defendants had no legitimate reasons for terminating Ms. Parker's employment.

43. Defendants' actions violated and continue to violate Ms. Parker's rights under the Alaska Constitution, Article I § 5.

44. Defendants' violation of Ms. Parker's rights under the Alaska Constitution, Article I § 5, was done with intent and with gross and reckless disregard of her constitutional rights.

45. Ms. Parker was harmed by defendants' actions, including but not limited to lost wages and benefits.

SECOND CAUSE OF ACTION
VIOLATION OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

46. Every at-will employment contract in Alaska contains an implied covenant of good faith and fair dealing.

47. The objective component of the implied covenant requires that an employer not treat an employee in a manner that a reasonable person would regard as unfair.

48. The subjective component of the implied covenant requires that an employer not make an adverse employment decision based on an improper motive.

49. Defendants violated both prongs of the covenant of good faith and fair dealing by terminating Ms. Parker's employment for an unconstitutional reason – her exercise of her right to speak freely, to refrain from speaking, and to refrain from associating herself with the incoming Governor's political agenda.

50. Defendants violated both prongs of the covenant of good faith and fair dealing by terminating Ms. Parker's employment in violation of the policy expressed in AS 44.21.440, which requires that OPA attorneys provide service to their clients in a manner that avoids conflicts of interest.

51. The public policy of the State of Alaska, expressed in AS 44.17.040, is that the principal executive officer of each Department is responsible for the appointment and removal of employees within the Department. AS 44.21.420(b) expressly grants hiring and firing authority within OPA to the Commissioner of the Department of Administration, who typically delegates this authority to the director of the Office of Public Advocacy.

52. Defendants violated the implied covenant of the good faith and fair dealing by acting contrary to the policy in AS 44.17.040 and 44.21.420(b) and arrogating to themselves the authority to terminate Ms. Parker's employment.

53. Defendants' violation of the covenant of good faith and fair dealing caused Ms. Parker harm, including but not limited to lost wages and benefits.

THIRD CAUSE OF ACTION
OPA'S CLIENTS' RIGHTS TO CONFLICT-FREE REPRESENTATION
VIOLATION OF ALASKA CONSTITUTION, ARTICLE I §§ 7, 11

54. As an attorney who represented indigent, court-appointed clients, Ms. Parker may assert the rights of her former clients.

55. The clients of an OPA attorney, such as Ms. Parker, have a right to conflict-free representation. That right is established both by statute, AS 44.21.440(a), and by the Rules of Professional Conduct that control the attorney, including Professional Conduct Rules 1.7(a)(2), 1.8(f)(2), and 5.4(c).

56. Conflict-free representation is an essential part of effective assistance of counsel.

57. A criminal defendant's right to effective assistance of counsel is guaranteed by Article I § 11 of the Alaska Constitution.

58. A parent's right to effective assistance of counsel in a CINA case is guaranteed by the due process clause of the Alaska Constitution, Article I § 7.

59. Through their actions as described above, defendants violated and continue to violate the rights of OPA's clients under AS 44.21.440(a) and Article I §§ 7 and 11 of the Alaska Constitution by insisting that they have the right to fire OPA attorneys if they refuse to affirm their desire to work in support of the incoming or the current political administration.

60. OPA's clients were harmed and continue to be harmed through the denial of their right to be represented by attorneys who are not subject to a conflict of interest between their personal interest in job security and their interest in zealously representing their clients.

PRAYER FOR RELIEF

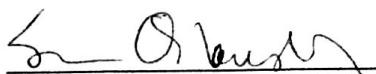
Based on the facts and causes of action set forth above, Kelly Parker requests that judgment be entered in her favor and against defendants as follows:

- A. For declaratory judgment that, in terminating Ms. Parker's employment, defendants violated her free speech and association rights, as guaranteed by Article I § 5 of the Alaska Constitution;
- B. For declaratory judgment that, in terminating Ms. Parker's employment, defendants violated her rights as guaranteed by the covenant of good faith and fair dealing;
- C. For declaratory judgment that defendants' actions violated the rights of OPA clients to conflict-free representation;
- D. For injunctive relief enjoining the State in the future from placing Assistant Public Advocates at risk of being terminated directly or indirectly by the Governor, as the head of the State, which is legally adverse to OPA's clients;
- E. For an award of damages for lost pay and benefits, both past and future, in an amount to be proven at trial;

F. For costs and attorneys' fees incurred in obtaining the relief sought in this case; and

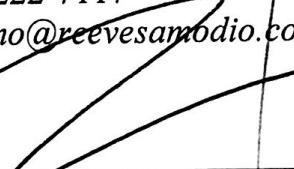
G. For such other relief as the court deems just and equitable.

Dated this 8 day of October, 2019.


Susan Orlansky [8106042]

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MEMORANDUM

From: Tuckerman Babcock,
Governor-Elect Dunleavy
Transition Chair

Date: November 16, 2018

Re: Request for Resignation

Over the next several weeks, the outgoing and incoming administration are working together to make the transition from Governor Walker to Governor-Elect Dunleavy as seamless as possible. Both administrations greatly appreciate the dedication and service of all employees who serve the State of Alaska. We understand that transitions can be difficult both personally and professionally. Therefore, we are working to provide you with information to make the transition process as smooth as possible.

As you are aware, Governor-Elect Dunleavy will be sworn into office on Monday, December 3, 2018. In the coming weeks, the incoming administration will be making numerous personnel decisions. Governor-Elect Dunleavy is committed to bringing his own brand of energy and direction to state government. It is not Governor-Elect Dunleavy's intent to minimize the hard work and effort put forth by current employees, but rather to ensure that any Alaskan who wishes to serve is given proper and fair consideration.

As is customary during the transition from one administration to the next, we hereby request that you submit your resignation in writing on or before November 30, 2018 to Team2018@alaska.gov. If you wish to remain in your current position, please make your resignation effective upon acceptance by the Dunleavy administration.

Acceptance of your resignation will not be automatic, and consideration will be given to your statement of interest in continuing in your current or another appointment-based state position. Please also include your e-mail address and phone contact so that you can be reached to discuss your status directly.

Governor-Elect Dunleavy is encouraging you and all Alaskans to submit their names for consideration for service to our great state. Should you desire to continue your service to the State of Alaska in another appointment-based position, you are invited to submit your information and the position(s) you desire for consideration before December 3, 2018. Please submit your application through the portal located at GOVERNORMIKEDUNLEAVY.COM.

We appreciate your assistance and cooperation during this period of transition. Again, we wish to express our sincere gratitude for your dedication and service to the State of Alaska and wish you the best in your future endeavors.

Note: If you believe you have received this message in error please so indicate in a reply to the above electronic mail address.

Kelly Parker
100 Cushman St., Ste. 201
Fairbanks, AK 99701
(907) 451-5938
kelly.parker@alaska.gov

November 30, 2018

VIA EMAIL

Governor-Elect Mike Dunleavy
Team2018@alaska.gov

Dear Governor-Elect Dunleavy:

I write this letter in response to Transition Chair Tuckerman Babcock's November 16, 2018, Request for Resignation Memorandum.

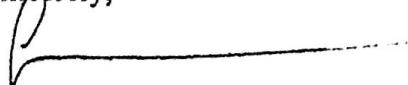
As an Assistant Public Advocate with the Office of Public Advocacy, I am appointed by the court to represent indigent criminal defendants, juveniles in delinquency matters, and parents and children in child in need of aid cases. As an attorney and a member of the Alaska Bar Association, I am bound by the Professional Rules of Conduct. I have a duty of loyalty to all of my clients, and it is my responsibility to remain undivided in that loyalty and to avoid personal conflicts of interest.

Mr. Babcock's request for my resignation and statement of interest in retaining my position—paired together with statements to the media that any such resignation and statement from a State employee in response to Mr. Babcock's request will be taken to mean that the employee is affirmatively stating that the employee wants to work for your administration and on your agenda, and that those who do not submit such a resignation and statement will be terminated—appears to require a pledge of loyalty from me in order to retain my position.

Because of my role as a defensive advocate and my professional responsibilities as a member of the Alaska Bar Association, I cannot comply with Mr. Babcock's request. The State of Alaska, in all cases, is legally adverse to my clients. It would therefore be extremely problematic for me to pledge personal loyalty to the head of the State in order to retain my role as an Assistant Public Advocate. Were I to do so, I would create a substantial ongoing personal conflict of interest, placing my personal interests (my job, income, family, home, etc.) above my clients' interests, damaging the client-attorney relationship, and interfering with my ability to zealously represent my clients.

To be clear, I do not wish to be terminated. I work hard for my clients, and I desire to continue to serve my clients in my current position. I love Alaska, and I believe that you do too. I hope that we can each move forward in our positions and preserve the sanctity of our adversarial justice system.

Sincerely,


Kelly Parker

From: TEAM2018, gov (GOV sponsored)
Sent: Monday, December 3, 2018 11:27 AM
To: Parker, Kelly S (DOA) <kelly.parker@alaska.gov>
Cc: Lowenstein, Cheryl A (DOA) <cheryl.lowenstein@alaska.gov>
Subject: Employment Notification

Thank you for your service to the State of Alaska. You are hereby notified that your position has been terminated effective December 3, 2018 at noon. If you have any questions, please contact your administrative services director.

Tuckerman Babcock
Governor-Elect Dunleavy
Transition Chair

cc: Cheryl Lowenstein, Administrative Services